

Service Date: October 10, 2006

DEPARTMENT OF PUBLIC SERVICE REGULATION  
MONTANA PUBLIC SERVICE COMMISSION  
P.O. Box 202601  
Helena, Montana 59620-2601

IN THE MATTER of Brian David Parks dba )	TRANSPORTATION DIVISION
Mountain Express Taxi, Missoula, Montana, )	DOCKET T-06.14.PCN
Montana, Application for a Montana Intrastate )	ORDER NO. 6778
Certificate of Public Convenience and Necessity. )	

**PROPOSED ORDER**

APPEARANCES

FOR THE APPLICANT

Ryan C. Willmore, Browning, Kaleczyc, Berry & Hoven, 269 West Front Street,  
Missoula, MT 59802

FOR THE PROTESTANTS

Elaine Olsen, 361 Rummel Lane, Hamilton, MT 59840

COMMISSION STAFF

Timothy N. Sweeney, Attorney, Legal Division, 1701 Prospect Avenue, Helena,  
MT 59620

BEFORE

Doug Mood, Commissioner and Hearing Examiner.

INTRODUCTION AND PRELIMINARY DECISIONS

1. On April 12, 2006, Brian David Parks, dba Mountain Express Taxi, Missoula, Montana, filed before the Montana Public Service Commission (MPSC or Commission) Docket No. T-06.14.PCN, an application for Intrastate Certificate of Public Convenience and Necessity, Class B, authorizing transportation of the following: Passengers between all points and places in Missoula and Ravalli Counties in the State of Montana; limitations: (1) Transportation as a limousine is prohibited; (2) Transportation that originates and terminates in Missoula County is prohibited.

2. On July 19, 2006 the Commission Staff, through its delegated authority, issued a Procedural Order governing procedural and scheduling policies.

3. On July 24, 2006, Victor Pizzola d/b/a Valley Taxi (Valley Taxi) filed the following motions in the above-referenced action:

Motion for Summary Judgment. The public hearing noticed for August 2, 2006 is intended to ascertain facts relevant to the application of Brian David Parks d/b/a Mountain Express Taxi (Mountain Express Taxi) for a certificate of public convenience and necessity. Since the standard for granting summary judgment is that no questions of fact exist, Valley Taxi's motion is premature and must be denied.

Motion to Sequester. Sequestration is an extraordinary measure -- made all the more extraordinary by Valley Taxi's request to sequester *every* witness -- requiring a compelling justification. Valley Taxi has failed to justify the imposition of sequestration and its motion is therefore denied.

Motions for Stipulation. Valley Taxi asks the Commission to enter, on behalf of Mountain Express Taxi, a series of stipulations concerning limousine authority, seating

capacity, origination/termination language, and service to Missoula Airport. To be properly considered, these stipulations must be submitted to the Commission by the Applicant, Mountain Express Taxi. Therefore, Valley Taxi's motions for stipulation are denied.

4. On July 24, 2006, Mountain Express Taxi filed a Motion in Limine requesting the following actions. (Commission analysis follows the Motion.)

Protestant Valley Taxi should be precluded from presenting evidence of previous cases. The public hearing noticed for August 2, 2006 is intended to ascertain facts relevant to Mountain Express Taxi's application for a certificate of public convenience and necessity. Findings and holdings associated with prior dockets are not evidence per se and are appropriately addressed in post-hearing briefs. Therefore, Valley Taxi is precluded from presenting evidence of prior dockets during the August 2<sup>nd</sup> evidentiary hearing.

Protestant Valley Taxi should be precluded from attempting to provide evidence of harm to existing motor carriers other than Valley Taxi. Evidence of harm to other motor carriers must be presented by those carriers. Valley Taxi is therefore precluded from presenting evidence of harm to carriers other than itself.

Protestant Elaine Olsen should be excluded as a party to this matter. Protestant Elaine Olsen is the proposed transferee in Docket T-06.15.ST. Her standing in this Docket is contingent on the successful transfer of authority in Docket T-06.15.ST. Should the transfer be denied, all testimony and evidence offered by her in this Docket will be stricken.

Protestant Elaine Olsen should be excluded from asserting Protestant Victor

Pizzola's interests. It is well-settled law that representation before administrative agencies is the practice of law. While Protestant Victor Pizzola may appear pro se or be represented by counsel, he may not be represented by his mother, Elaine Olsen, who is not licensed to practice law in the State of Montana.

5. On July 27, 2006, at a properly noticed out-of-cycle work session, the Commission, by a vote of 5-0, denied Valley Taxi's Motion for Summary Judgment, Motion to Sequester, and Motions for Stipulation; and, by a vote of 5-0, granted Mountain Express Taxi's Motions in Limine #1, #2, and #4; and denied its Motion in Limine #3.

6. Following proper notice, on Wednesday, August 2, 2006, Commissioner Douglas Mood called to order the public hearing held pursuant to the Commission's jurisdiction under Title 69, Chapter 12, Montana Code Annotated; specifically Sections 69-12-312, 69-12-415, MCA, and conducted under the Montana Administrative Procedures Act, Title 2, Chapter 4, Montana Code Annotated. TR 4:3-9.

7. At hearing, counsel for Applicant moved that Victor Pizzola be dismissed as a party since he was not present. TR 7:9-12. Commissioner Mood took the motion under advisement, for ruling by the Commission in toto. TR 7:13-14

8. At the close of the hearing it was mutually agreed that a proposed order would be issued, with a single round of briefing due September 1, 2006. TR 92:4-6.

9. The parties stipulated at hearing to the admission of all pre-filed exhibits once introduced and ruled relevant. TR 6:18 to 7:6

SUMMARY OF TESTIMONY

Testimony for the Applicant

10. Applicant initially called Protestant Elaine Olsen, who identified herself as a silent partner and backer of Valley Taxi, describing her involvement as including administrative work, driving, and dispatching. TR 8:13-22. She indicated that her son, Victor Pizzola, is the designated owner for permit purposes; he is driver with 14-years experience; and he's currently incarcerated at Warm Springs. TR 9:4-14. Protestant stated also that Valley Taxi participates in the Home Free Program, but that none of the local bars currently participate. TR 9:15 to 10:4.

11. Applicant's next witness was Calvin McOmber, owner of the Corvallis Tavern and representative of the Ravalli County Tavern Association. He testified to the initial success of the Home Free Program, a joint effort between Valley Taxi and local tavern owners to provide tavern customers with vouchers (purchased by the taverns) for taxi service from the tavern to their respective homes; and the demise of the program when Victor Pizzola took over Valley Taxi, when he either wouldn't show-up or arrived too late. TR 15:21-16:25. Calvin McOmber still tries to use the program, but phone calls go unanswered or Valley Taxi doesn't show-up; he has recently started-up an alternative program because of these problems. TR 17:6-17:21. He believes there is a public need for the service proposed by the Applicant and the existing taxi service isn't meeting this need recently. TR18:3-18:17:

It's important to us, our industry, or business, to be able to get a safe ride home for somebody that's impaired, had too much to drink or whatever, and right now we don't have that. We have a designated driver program, which is completely different than a Home Free Program, and it's a valuable tool for us.

TR 18:9-15.

12. Calvin McOmber concluded his testimony by stating that he and his clients would use the proposed service (TR 18:19-21), and he felt Applicant was fit to provide the proposed service. TR 19:4-6.

13. Applicant's next witness was Peggy Metivier, a bookkeeper and driver for Medicab, who testified that she experienced difficulties using Valley Taxi's voice-mail system, and on the one occasion she was able to leave a message, she never received a call-back. TR 22:6-11. When asked whether, in her capacity with Medicab, she had received any complaints concerning the Applicant, she said "[N]o." TR 22:23-25. She, too, felt Applicant was fit to provide the proposed services. TR 22:20-22.

14. Applicant's next witness was Rhonda Smith, a customer of taxi-cab services, who testified that she called Valley Taxi for a ride, was routed to Valley Taxi's voice-mail system, but never received a call-back. TR 23:20 to 24:1-2. Since she never received a call-back, Rhonda Smith felt there was a need for a taxi service and the existing service was not meeting that need. TR 24:9-15.

15. Applicant's next witness was Anna Hughes, case manager for Opportunity Resources, an organization providing case management for adults with developmental disabilities living in rural areas. TR 25:10-12. She testified that she had tried to use Valley Taxi on behalf of her clients, but the service was either late or did not show-up. TR 25:19-25. Anna Hughes further testified that she felt Valley Taxi was unreliable, there is a public need for a taxi service that isn't being met, and she and her clients would

use the Applicant's proposed service. TR 26:2-17. She also stated that she had no reason to believe that Applicant wasn't fit to provide the proposed services. TR 26:18-20.

16. Applicant's next witness was Jeannie Poe, local coordinator for the Salvation Army, testified that she had occasion to use Valley Taxi to transport "stranded" clients, and that Valley Taxi failed to appear in two separate incidences. See TR 28:1 to 29:3. She further testified that Valley Taxi was not reliable, there was a public need for a taxi service in Ravalli County, Valley Taxi was not meeting that need, and her clients would use the Applicant's service. TR 29:4-13.

17. Applicant's next witness was Lori Smith, a social worker with Adult Protective Services, who testified "I stopped using Valley Taxi about three years ago. I felt it was a serious liability to my department and my wards...." TR 30:22-25 When asked about her experience with Valley Taxi, she stated:

Yes. I had numerous referrals in regard to (Valley Taxi, owner/operator) Victor. There were concerns that there were drugs in the car; that he was borrowing money from clients; that there wasn't seat belts. He was continually late picking people up or would not show up at all.

TR 30:11-18.

18. The final witness was Applicant Brian David Parks, also owner/operator of Medicab, a taxi service run out of Missoula. He testified that he has been successfully running Medicab for over three years, and considered himself experienced at running a taxi service. TR 32:22 to 33:3. On cross-examination, Applicant testified that if granted authority he intended to purchase a four-door sedan vehicle and a wheelchair van. TR 35:20-23.

Testimony for the Protestant

19. Protestant Elaine Olsen, owner and operator of Valley Taxi, testified in opposition to the application. While acknowledging problems with Valley Taxi's messaging system and other service-related issues, she felt Valley Taxi adequately served the Ravalli County area. TR 53:4-11

20. On cross-examination, Elaine Olsen acknowledged that Victor Pizzola, another owner/operator of Valley Taxi, tested positive for "meth" and THC during December of 2005, a month during which he provided taxi services for Valley Taxi. TR 59:15 to 60:5. She further acknowledged that Valley Taxi was using a single vehicle to provide services for the entire Ravalli County. TR 60:10-16.

21. On cross-examination related to the number of vehicles owned and operated by Valley Taxi, Elaine Olsen testified that Valley Taxi owned two vehicles (TR 61:2); normally operated one vehicle (TR 11:22-24) and used an "on-call" system for the second vehicle (TR 61:13 to 62:10), indicating that Valley Taxi used a second, separate phone number for operation of the second vehicle. TR 74:20 to 75:20.

Testimony of Public Witnesses

22. Mary Millin testified that she had difficulty procuring services from Valley Taxi; in part, because Elaine Olsen advised her that 24-hour notice would be required; in part, because the messaging system didn't clearly identify itself as being the system for Valley Taxi. TR 77:5-11.



23. James Gestautas testified, as owner of the hideout Restaurant and Casino, that in December, when he made reservations and arrangements for different groups to come out for a company party, Valley Taxi never showed-up. TR 78:10-13. Further, he testified that booking service was “hit and miss” and he had concluded Valley Taxi was no longer in business. TR 78:21-25.

24. Joan Marie Conner testified that she is transportation dependent and at one time, when “Larry was driving,” she used Valley Taxi quite a bit; but, from the point Victor was driving, she didn’t have service. TR 79:10-13. She further described two other instances – one when she first used Valley Taxi and the other more recently, when she didn’t receive a call back. TR 79:14 to 80:7. She concluded by saying there needed to be a change because the needs of the consumers were not being met. TR 80:8-10

25. Jan Shighley testified to her unsuccessful experience at procuring services from Valley Taxi. On one occasion she called Valley Taxi at 8:30 p.m. on a Sunday night, seeking a ride home from the hospital; she got no answer and had to walk home. TR 81:20-23. She concluded her testimony by saying “I really don’t believe that we have an active cab company that’s really meeting the needs of the public right now. When you do call to get a ride, you get an argument, very similar to the arguments we’ve had today.” TR 84:20-24.

26. Joanne Martin, appearing on behalf of Marcus Daly Hospital, testified that the hospital had been tracking its phone calls to Valley Taxi, and there have been only two occasions when they reached a live person. TR 85:20-24.

27. Joanne Perkins, Chair of the Ravalli County Transportation Advisory Committee, referenced a May 14, 2003 letter from the Committee to the Commission that documented the Committee's inability to procure services from Valley Taxi. TR 87:5-9.

28. Cheryl Patzer, owner of the Coffee Cup, a local business, testified that Valley Taxi's record was much better when Elaine Olsen was more involved. TR 91:10-13

### EXHIBITS

29. No exhibits were introduced at hearing

### DISCUSSION, ANALYSIS AND FINDINGS

30. In considering applications for operating authority, the Commission is governed by the provisions of § 69-12-323, MCA. Paragraph (2)(a) of that section provides:

If after hearing upon application for a certificate, the commission finds from the evidence that public convenience and necessity require the authorization of the service proposed or any part thereof, as the commission shall determine, a certificate therefore shall be issued. In determining whether a certificate should be issued, the commission shall give reasonable consideration to the transportation service being furnished or that will be furnished by any railroad or other existing transportation agency and shall give due consideration to the likelihood of the proposed service being permanent and continuous through 12 months of the year and the effect which the proposed transportation service may have upon other forms of transportation service which are essential and indispensable to the communities to be affected by such proposed transportation service or that might be affected thereby.

31. Applying this language to the facts presented by any application for transportation authority, the Commission has traditionally undertaken the following

analysis: First, it asks whether the applicant has demonstrated that there is a public need for the proposed service. If the applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers; the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the applicant fit to provide the proposed service.

32. The traditional analysis described above has perhaps been stated most concisely in the case of Pan American Bus Lines Operation, 1 M.C.C. 190, 203 (1936):

The question, in substance, is whether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing lines of carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest.

33. Establishment of public need requires the testimony of “shipper witnesses.” The Commission has stated that it “has traditionally relied upon shipper witnesses to establish and substantiate public need -- a shipper witness being one who can testify as to a personal need for the service, as opposed to a witness who merely opines that others have a need for the proposed service.” Application of Jones Brothers Trucking, Docket No. T-9469, Order No. 5987a, p. 9 (1990). In the context of passenger

transportation this means that the best evidence is from persons who actually use, or have tried to use, or who desire to use a particular kind of transportation. The representative from Valley Taxi took issue with the fact that the affiant shipper witnesses, each of whom executed an affidavit in support of the Mountain Express Taxi application, did not personally appear at the hearing. However, there were a number of applicant and public witnesses who use or used the Valley Taxi service and felt there was a definite need for the Applicant's service. See ¶ 12; ¶ 13; and ¶ 23. There is no requirement that shipper affiants appear at hearing, only that public need be established and substantiated by shipper witnesses. In this regard, shipper witnesses did appear at the hearing and, based on their testimony, the Commission concludes there is a public need for a responsive and capable taxi service.

34. The record is replete with testimony complaining about Valley Taxi's service or lack thereof. Witnesses such as Joanne Martin, appearing on behalf of Marcus Daly Hospital, complained that the phone was rarely answered by a "live" person. ¶ 24. And, many of the witnesses took issue with the voice-mail system, complaining that messages went unanswered. See e.g., ¶ 14. In general, there was considerable testimony that Valley Taxi either didn't return messages or simply didn't show-up. The Commission is troubled by the cross-examination of Elaine Olsen, during which she countered service complaints regarding the voice-mail system and unreturned calls by stating:

I get an immediate alert when the phone call comes in, either on my PC if I'm at home or on my cell phone when I'm out, because I could be driving. That doesn't mean I can answer it immediately. I may be out of the vehicle and have the message or I may be talking to someone else or, you know. I mean, I would answer it immediately providing I wasn't

doing anything. If I'm not driving, I do answer it immediately, within a minute.

TR 66.

Given the wealth of testimony to the contrary, the Commission is hard-pressed to believe that Valley Taxi is fielding or returning calls with the proficiency claimed by Elaine Olsen.

35. Equally troubling was the cross-examination testimony of Elaine Olsen concerning the availability of taxi cabs, during which she stated "There's always two vehicles available for transport unless there's a mechanical problem, but we don't always have two vehicles on the road." TR 61:5-7. Mechanical problems or not, this response is directly contradicted by her earlier testimony, during which she stated that there's only one taxi ever operating unless there's a reservation. TR 11:22-24. And, then there's Elaine Olsen's admission that Valley Taxi is covering entire Ravalli County with one car. TR 60:10-16.

36. Generally speaking, the Commission recognizes it may not be economically feasible to have two vehicles on the road at all times, but the testimony concerning unreturned calls and no-shows (by the taxi) begs the question as to why Valley Taxi isn't operating two cars with more regularity. Elaine Olsen claims that Valley Taxi has on call drivers (TR 61:13), and the second car is dispatched "[u]sually, right away" (*id.*), but this testimony is directly at odds with the customers who claimed their calls for service went unanswered, as well as her own testimony stating that there's only one taxi covering the service area. See ¶ 35. Valley Taxi may or may not have the capability to meet the public need from an equipment perspective, but the Commission

finds that, based on its failure to provide responsive service, Valley Taxi is unwilling to meet the demonstrated public need.

37. Once need has been established, along with the inability or unwillingness of existing carriers to meet the need, the Commission must decide whether a grant of additional authority will harm existing carriers contrary to the public interest. The burden to establish such harm is on the Protestant Valley Taxi, a burden that Valley Taxi did not carry or attempt to carry. Valley Taxi did not provide any financial evidence at hearing designed to show that it cannot survive an additional grant of authority.

38. A determination of carrier fitness must be made prior to granting operating authority. Possibly the best measure of Brian David Parks fitness is his three-plus years of successfully providing taxi service under the Medicab certificate. See ¶ 18. Also, the supportive testimony of his bookkeeper/driver, Peggy Metivier, cannot be dismissed as simply biased. See ¶ 13. Her testimony, based on her experience in the taxi business and with Applicant, was uncontradicted and consistent with the testimony of other witnesses who also felt the Applicant was fit. See ¶ 12 and ¶ 15. On the basis of Applicant's past experience and the supporting testimony, the Commission finds that David Parks possesses the requisite carrier fitness.

### DECISION

39. The Commission finds that the Applicant has satisfied the elements of public convenience and necessity, and grants the Application of Brian David Parks, doing business as Mountain Express Taxi in Missoula, Montana, for a Montana Intrastate Certificate of Public Convenience and Necessity authorizing transportation of the

following: Class B – Passengers between all points and places in Missoula and Ravalli Counties in the State of Montana. Limitations: (1) Transportation as a limousine is prohibited; (2) Transportation that originates and terminates in Missoula County is prohibited.

#### CONCLUSIONS OF LAW

1. The Montana Public Service Commission properly exercises jurisdiction over the parties and matters in this proceeding pursuant to Title 69, Chapter 12, Montana Code Annotated.
2. The Commission has provided adequate notice and opportunity to be heard to all interested parties in this matter.
3. Applicant has demonstrated public demand or need for the proposed service, and has demonstrated that existing carriers cannot meet that demand or need as well.
4. Applicant has demonstrated fitness to provide the proposed service.
5. The authority granted by this Order will not have an adverse impact on existing transportation service contrary to the public interest.

ORDER

Now, therefore, it is ordered that the application in this docket is granted as follows:

Class B – Passengers between all points and places in Missoula and Ravalli Counties in the State of Montana. LIMITATIONS: (1) Transportation as a limousine is prohibited; and (2) Transportation that originates and terminates in Missoula County is prohibited.

DONE and dated this 6th day of October, 2006.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DOUG MOOD, Commissioner

ATTEST:

Connie Jones  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.



## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Proposed Order issued in Docket T-06.14.PCN in the matter of Brian David Parks dba Mountain Express Taxi, Missoula, Montana, Application for a Montana Intrastate Certificate of Public Convenience and Necessity, has today been sent to all parties listed.

MAILING DATE: October 10, 2006

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FOR THE COMMISSION

### **FIRST CLASS MAIL**

Brian David Parks  
dba Mountain Express Taxi  
3301 Park Street  
Missoula, MT 59801

Victor I. Pizzola  
dba Valley Taxi  
361 Rummel Lane  
Hamilton, MT 59840

Ryan C. Willmore  
Attorney at Law  
269 West Front Street  
Missoula, MT 59802

Elaine Olsen  
dba Valley Taxi  
361 Rummel Lane  
Hamilton, MT 59840

### **AS ITS INTERESTS MAY APPEAR:**

Montana Consumer Counsel  
616 Helena Avenue  
P.O. Box 201703  
Helena, MT 59620-1703